

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D.C. 20548

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FILE: B-192784

DATE: January 10, 1979

MATTER OF: [Reimbursement by Federal agency of Private Attorney
for Out-of-Pocket Expenses in Agency Proceeding]

DIGEST: Nuclear Regulatory Commission (NRC) has no authority to reimburse private attorney for out-of-pocket expenses he incurred in connection with special NRC proceeding convened to investigate charges of misconduct by him against NRC attorneys and by NRC attorneys against him, as part of settlement and termination of proceeding.

This is in response to a request from the Chairman of the United States Nuclear Regulatory Commission (NRC) for our opinion on whether the NRC has the authority to reimburse a maximum of \$1,000 in actual out-of-pocket expenses incurred by a private attorney. NRC believes that the withdrawal, settlement and termination of the proceeding is in the public interest.

During NRC licensing hearings, charges of professional misconduct were brought by a private attorney representing a participant in the proceeding against two NRC staff attorneys, who also brought charges of professional misconduct against the private attorney. A "special proceeding" was initiated to investigate these charges. The parties to this dispute then reached a proposed settlement.

The settlement was, however, conditioned upon payment to the private attorney by NRC of up to \$1,000 for his out-of-pocket expenses incurred in connection with the special proceeding. The attorney points out that NRC has paid all the fees and expenses of its staff attorneys. NRC refused to agree to that condition. As a result of further negotiations, the private attorney has agreed, in effect, to withdraw his request for reimbursement for out-of-pocket expenses if this Office rules that the NRC lacks authority to reimburse him.

We are aware of no specific statutory authority for NRC to reimburse the private attorney. Such a payment can therefore be justified only if it is reasonably necessary and proper for, or incidental to, carrying out the purpose of NRC appropriations. 44 Comp. Gen. 312 (1964). We conclude that payment to the private attorney in these circumstances would not be necessary for or incidental to carrying out NRC functions.

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While under certain circumstances we have held that a regulatory agency could pay out-of-pocket expenses of an indigent intervenor whose participation was necessary in order for the agency to reach a full and fair decision on a regulatory or adjudicatory hearing, (B-180224, May 10, 1976), none of these circumstances are present in the instant case. The private attorney is a party, not an intervenor. The costs in question are not related directly to a licensing hearing before the NRC but to the special proceeding investigating charges of misconduct. There is no indication here that the private attorney is financially unable to participate. We are aware of no other basis for a Government agency to agree to reimburse costs incurred by a participant in an agency proceeding.

Payment of the expenses of its own staff attorneys by the NRC stands on a different footing. The United States acts through its employees. Accordingly, upholding the authority and propriety of action taken by employees in furtherance of their duties serves as well to protect the Federal Government as the employee. See, e.g., Johnson v. Maryland, 254 U.S. 51, 55-56 (1920). Federal employees would be less vigorous in upholding Federal law and in discharging their duties, if, when sued, they had to pay their own expenses of litigation. Also, since the conduct at issue was performed in connection with Federal employment, it may be important from a governmental standpoint to establish its legality. Therefore, it is Government policy to provide representation for Federal employees in proceedings against them as individuals but arising from the performance of their official duties. (B-130441, April 12, 1978.) NRC believes that the withdrawal, settlement and termination of the special proceeding is in the public interest. That determination is necessary, in the sense that NRC could not endorse a settlement if it believed that it was not in the public interest, but the belief that a settlement is in the public interest does not permit NRC to make expenditures in connection with a settlement which are beyond its legal authority.

In sum, we see no basis on which the NRC can reimburse the private attorney for out-of-pocket expenses in connection with the special proceeding brought to investigate misconduct charges.


Deputy Comptroller General
of the United States